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IN THE

Supreme Court of the United States

October Term, 1957

SEATRAIN LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA-
INTERSTATE COMMERCE COMMISSION
PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellees

On Appeal from the United States District Court for the District of Delaware

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JURISDICTIONAL STATEMENT

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Jurisdictional Statement

Appellant appeals from the judgment of the United States District Court for the District of Delaware, entered on June 17, 1957, dismissing its complaint, and submits this Statement to show the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinions of the District Court for the District of Delaware and of the Interstate Commerce Commission are not yet reported. Copies of the District Court's opinion, of the opinion of the Interstate Commission and of Division 4 thereof, are attached hereto as Appendix A.

Jurisdiction

This suit was brought under 28 U.S.C. Sec. 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on June 17, 1957, and notice of appeal was filed in that court on August 2, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C., section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *United States* v. *Capital Transit Co.*, 325 U.S. 357; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236.

Question Presented

Whether the Interstate Commerce Commission may grant an exemption to a water carrier from Part III of the Interstate Commerce Act under section 303(e)(2) thereof (62 Stat. 386, 49 U.S.C. sec. 903(e)(2)) without making jurisdictional findings that the exemption is consistent with and will effectuate the National Transportation Policy (54 Stat. 899, 49 U.S.C., preceding sec. 1), which declares that

> "All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy."

Statute Involved

Section 303(e)(2) (62 Stat. 386, 49 U.S.C. Sec. 903 (e)(2)) provides, in pertinent part:

> "It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II.

"Upon application of a carrier, made in such form and manner as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared."

The National Transportation Policy (54 Stat. 899; 49 U.S.C. preceding § 1)

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Sections 303(b)(c)(d)(e)(1) and (g) of the Interstate Commerce Act, as amended (49 U.S.C. Sections 303(b)(c)(d)(e)(1) and (g)) are set forth in Appendix A hereto.

Statement of the Case

The plaintiff, Seatrain Lines, Inc. (hereinafter Seatrain) holds a common carrier certificate for the carriage by water of commodities generally between the ports of

New York, Savannah, New Orleans and Texas City. (Transcript of ICC hearing, p. 86, hereinafter R.) It owns and operates shore facilities and six specially designed vessels reflecting an investment of some $24,000,000, R. 87, and it has furnished and is furnishing service within the area for which the exemption in suit was procured by Pan-Atlantic Steamship Corporation (hereinafter Pan-Atlantic), R. 87, 12.

Pan-Atlantic holds authority to transport commodities generally by water between the Gulf and North Atlantic ports, R. 7. In the summer of 1955, Pan-Atlantic acquired two tankers of the T-2 type, which it had fitted with spar decks to permit the transportation thereon of general commodities in trailer bodies. R. 9. At times it employed said tankers between West Gulf and Atlantic ports for the transportation of bulk petroleum exclusively. R. 19. Such transportation is exempt from Part III of the Interstate Commerce Act by the terms of Sec. 303(d) thereof. 49 U.S.C. Sec. 903(d). When "bulk petroleum is carried in a vessel which also carries regulated dry cargo, the bulk petroleum is subject to regulation unless an exemption order such as that under attack is obtained from the Commission." (Appendix B, p. 4A)

By application filed with the Commission on August 22, 1955, Pan-Atlantic sought an order under Sec. 303 (e)(2) of said Act, exempting its transportation of bulk petroleum as a contract carrier from said Part III when said petroleum is carried in the same vessel at the same time with general commodities under the aforesaid authority. The exemption sought by Pan-Atlantic was opposed by Seatrain and by certain Southern and Southwestern railroads.

On July 3, 1956, Division 4 of the Commission issued an order exempting transportation by Pan-Atlantic as a contract carrier of bulk petroleum, when carried on the same vessel with dry cargo, from the provisions of Part

III of the Act as requested by Pan-Atlantic. (Appendix B, p. 29A). On September 20, 1956 Seatrain's petition for reconsideration of said order was denied and the Commission made the Division 4 order effective as of October 22, 1956. (Appendix B, p. 30A).

Seatrain brought this action to set aside the order of the Commission in the United States District Court for the District of Delaware under 28 U.S.C. Sections 1336 and 2201. The District Court entered an order dismissing the complaint on June 17, 1957. It held that in granting an exemption to a water carrier under 49 U.S.C., sec. 903(e)(2), the Commission is not required to make findings that the exemption is consistent with the National Transportation Policy.

The Question Is Substantial

The issue is whether an order of the Commission which contains no jurisdictional finding that its action is consistent with the National Transportation Policy (hereafter NTP) can stand. The NTP provides that

> "All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy."

Other courts have held that the Commission is required both to consider and to make findings with respect to the NTP. *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72, 81, 82; *Pacific Inland Tariff Bureau* v. *United States*, 134 F. Supp. 210, 212-213. (Cf. *Mahler* v. *Eby*, 264 U.S. 32; *United States* v. *Carolina Freight Carriers*, 315 U.S. 475, 488-489.) The decision of the court below is in conflict with those decisions.[1]

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[1] The court below would distinguish these cases on the ground that they arose "under the rate provisions of the Act or in connection with the granting of a certificate of convenience and necessity," whereas the present case arises under sec. 303(e)(2) of the Act (Appendix B, p. 22A).

The court below found that the Commission "expressly declined to consider" and "did not consider" the NTP (Appendix B, pp. 15A-16A). The Commission made no finding with respect thereto. The court below concedes that

> "If one were to accord a literal reading to the National Transportation Policy, remand to the Commission would be necessary because the last sentence of the National Transportation Policy provides: 'All of the provisions of this Act shall be enforced and administered with a view to carrying out the above declaration of policy.' *If 'all' means 'all', the Commission erred* by reason of its failure to make jurisdictional findings under the National Transportation Policy." (Appendix B, p. 17A). (Emphasis supplied throughout.)

Ours is not a case where the express terms of the National Transportation Policy must be disregarded in order to avoid an unreasonable construction or to effectuate the legislative intention as expressed in the legislative history. Instead, the court below bottomed disregard of the literal terms on an attempt to spell out from other portions of the statute that 'all' means something less than 'all' (Appendix B, p. 17A). This is a bold new view that finds neither judicial nor administrative precedent. Cf. Appendix B, p. 17A

At no time did the Commission maintain that sec. 303 (e)(2) was outside the orbit of the NTP. It merely disclaimed in the court below that it had "refused to consider" the NTP. ICC brief, pp. 10, 20. Indeed, it urged that 303(e)(2) and the NTP

> "state correlative propositions which are so harmonious that a finding under section 303(e)(2) assuredly *must reflect* the intent and spirit of the National Transportation Policy * * *". Id. at 16.

And it further stated that

> "exemption is required by the National Transportation Policy * * *", id. at 19,

in which case, of course, an express finding to that effect is required. In a word, the administrative interpretation recognizes the force of the literal language of the NTP.

1) The court below first relied on sections (b), (c) and (d) of sec. 303 (49 U.S.C., section 903) on the ground that

> "These provisions provide for exemption from regulation without regard to the National Transportation Policy" (Appendix B, p. 17A).

To be sure,

> "If the applicant otherwise qualifies, the *Commission cannot withhold* these exemptions by reason of operating rights under the exemptions being contrary to the National Transportation Policy" (Appendix B, p. 18A).

For these are the "automatic," or what the court below terms the "absolute," exemptions (Appendix B, p. 19A), which Congress directly conferred without the need for Commission action, provided only that the water carrier met the terms of said subsections. Since, in the words of the court below, "the Commission has no power to grant or withhold" these exemptions (Appendix B, p. 21A), the NTP has no application because it has reference to provisions that must be "administered and enforced" by the Commission. Moreover, when the Congress provided in said subsections that "Nothing in this part shall apply" to the described transportation, it unmistakably removed those sections from the sweep of the NTP. Because Congress can set the NTP to one side it does not follow that the Commission can.

2) Next the court below concluded that because subsections (e)(1) and (g) are framed with reference to the NTP whereas (e)(2), the subsection which governs the instant case, makes no mention thereof, Congress

thereby indicated that the NTP was not intended to apply to subsection (e)(2). (Appendix B, p. 20A).

a) By subsection (g) the Commission was authorized to deny an exemption, which was otherwise "absolute", if such denial would carry out the NTP. Subsection (g) provides that "the provisions of this part shall not apply" to certain transportation except to the extent that the Commission

> "shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy . . . ."

It does not follow that because 303(g) expressly confers a power to *deny* an otherwise absolute exemption in order to *effectuate* the NTP that (e)(2) impliedly confers authority to *grant* an exemption in *derogation* of the NTP merely because it does not mention the NTP.

b) Subsection (e)(1) categorically declares that the Commission may exempt certain transportation "Notwithstanding any provision of this part". This was equivalent to an exemption from the Act. Yet even here Congress insisted upon

> "a finding that such application of such requirements thereto is not necessary to carry out the National Transportation Policy declared in this Act."

Since the exemption was from every part of the Act, the NTP too would have been inapplicable without express mention. If anything, therefore, (e)(1) underscores the solicitude of Congress to preserve the NTP from the sweep of an all inclusive exemption. To compare (e)(1) with (e)(2) is to compare utterly dissimilar things. Subsection (e)(2) is not phrased in categorical terms; it is merely an *expression of policy:*

> "it shall be the policy of Congress to exclude from the provisions of this part"

the described transportation. Congress had no need to mention the NTP in (e)(2) because it had not expressly made it inapplicable; it could safely assume that under ordinary canons of construction the subsidiary (e)(2) "policy" would be accommodated to the expressly overriding policy of the NTP in order to give effect to both. The court below cut down the express terms of the NTP in a situation where there is no conflict between that policy and the "policy" of (e)(2).

The (e)(2) "policy" has reference solely to the absence of substantial competition with other common carriers. But, as this Court has said,

> "The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper inter se, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required." *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356, 361.

Such standards are spelled out in the NTP, which instructs the Commission to promote safe, adequate and efficient service, to foster sound economic conditions in the industry and reasonable charges for services, to guard against unjust discriminations, undue preferences, unfair practices, and to encourage fair wages and equitable working conditions. It needs more than the equivocal non-mention of the NTP in section 303(e)(2) to set these instructions aside and to make the absence of competition between carriers the sole criterion of exemption thereunder.

The NTP is placed at the very outset of the statute; it is expressly made applicable to "*all* of the provisions

of this Act." To hold that "all" does not mean "all" is to invite the Commission to explore still other possibilities of setting the NTP at naught. It was error to read an exception into this all-embracing phrase on the basis of an inference wrested from omission of a supererogatory mention of the NTP in (c)(2).

It is submitted that the decision of the court below fails to give effect to the literal terms of the National Transportation Policy and results in the first breach in a policy which the Congress deliberately made all-inclusive, but for very carefully limited exceptions spelled out by the Congress itself. The court below could point to no clearly expressed Congressional intention running counter to the intention which found expression in the literal terms of the NTP. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

Section 303 of the Interstate Commerce Act (54 Stat. 931, 49 U.S.C. 903)

* * * * *

(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

(c) Nothing in this part shall apply to transportation by a contract carrier by water of commodities in bulk in a non-ocean-going vessel on a normal voyage during which (1) the cargo space of such vessel is used for the carrying of not more than three such commodities, and (2) such vessel passes within or through waters which are made international for navigation purposes by any treaty to which the United States is a party.

(d) Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of section 4417a of the Revised Statutes (U.S.C., 1934 edition, Supp. IV, title 46, sec. 391a).

(e) (1) Notwithstanding any provision of this part the Commission may, by order, from time to time, upon application, or upon its own initiative without application, exempt from the requirements of this part the transportation of passengers between points in the United States by way of a foreign port or ports, upon a finding that application of such requirements thereto is not necessary to carry out the national transportation policy declared in this Act.

* * * * *

(g) Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this part shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not a part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors, or (2) to transportation by small craft of not more than one hundred tons carrying capacity or not more than one hundred indicated horsepower, or to vessels carrying passengers only and equipped to carry no more than sixteen passengers; or to ferries, or to the movement by water carriers of contractors' equipment employed or to be employed in construction or repair for such water carrier, or to the operation of salvors.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Civil Action No. 1847

SEATRAIN LINES, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION and PAN-ATLANTIC STEAMSHIP CORPORATION, INTERVENING DEFENDANTS

Daniel O. Hastings (of Hastings, Lynch and Taylor) of Wilmington, Del.; S. S. Eisen of New York, N. Y., and Raoul Berger of Washington, D. C. for plaintiff.

Victor R. Hansen, Assistant Attorney General, James E. Kilday and John H. D. Wigger, of Washington, D. C.; and Leonard G. Hagner, United States Attorney, of Wilmington, Del., for the United States.

Robert W. Ginnane, General Counsel, and H. Neil Carson, Assistant General Counsel, of Washington, D. C. for Interstate Commerce Commission.

Aaron Finger (of Richards, Layton & Finger) of Wilmington, Del.; William H. Armbrecht, Jr., of Mobile, Alabama, and Warren Price, Jr., of Washington, D. C. for Pan-Atlantic Steamship Corporation.

Before MARIS, Circuit Judge, and RODNEY and WRIGHT, District Judges.

WRIGHT, District Judge.

This is an action brought under 28 U.S.C. Sections 1336, 1398, 2201, 2284, and 2321 to 2325 inclusive, to restrain, enjoin, set aside and annul an order of the Interstate Commerce Commission (hereafter referred to as the Commission), or to obtain a declaratory judgment that such order is unlawful and invalid. Pan-Atlantic Steamship Corporation (hereafter referred to as Pan-Atlantic), is a common carrier by water which holds a certificate from the Commission authorizing it to transport passengers and commodities generally between specified Atlantic and Gulf ports. Plaintiff, Seatrain Lines, Inc. (hereinafter referred to as Seatrain), is a common carrier by water authorized by the Interstate Commerce Commission to transport commodities generally in interstate and foreign commerce between specified ports, some of which are the same ports at which Pan-Atlantic is authorized to call.

The Commission order under attack granted to Pan-Atlantic the right to carry in truck trailers or containers as deck loads on converted tankers, the general commodities its certificate issued by the Commission authorizes it to transport along with bulk petroleum without subjecting the bulk petroleum to regulation. The transportation of bulk petroleum alone in a given vessel is exempt under Section 303(d) of the Interstate Commerce Act, 49 U.S.C. Section 903(d). However, when bulk petroleum is carried in a vessel which also carries regulated dry cargo, the bulk petroleum is subject to regulation unless an exemption order such as that under attack is obtained from the Commission.

Seatrain operates specially designed vessels for the carriage of dry cargo. Each of these vessels also contains ten large side tanks with a capacity equivalent to more than one-third of the carrying capacity of each vessel. Prior to July 14, 1949, this capacity was not

utilized because Seatrain was unable to compete for bulk petroleum on equal terms with exempt tank vessel carriers[1] while any bulk petroleum it proposed to carry remained subject to regulation. This inability to compete was rectified in July, 1949 when the Commission, pursuant to 49 U.S.C. Section 903(e)(2), exempted from regulation Seatrain's transportation of bulk petroleum when such transportation was combined in the same vessel with the transportation of general commodities.

In the summer of 1955, Pan-Atlantic complemented its fleet of conventional C-2 type dry cargo vessels with the acquisition of T-2 type tankers. These tankers were subsequently equipped with cargo decks to permit the transportation thereon of containers and truck trailers. As a consequence, Pan-Atlantic found itself in a position analogous to that of Seatrain prior to the order of the Commission granting Seatrain an exemption from regulation of the bulk petroleum when carried with dry cargo on the same vessel. Accordingly, by application filed with the Commission on August 22, 1955, Pan-Atlantic sought the same exemption on virtually the identical petroleum products granted to Seatrain in 1949. This application for exemption was opposed by Seatrain and certain Southern and Southwestern railroads.

On July 3, 1956, Division 4 of the Commission issued an order exempting from regulation transportation by Pan-Atlantic of bulk petroleum from the provisions of Part III of the Interstate Commerce Act when carried on the same vessel with dry cargo. The exemption order relates only to bulk petroleum and does not affect the cargo to be carried on the spar decks of the converted T-2 tankers. The deck cargo, even when transported on the converted tankers with the exempt bulk petroleum will be carried at published tariff rates, and will be

[1] 49 U.S.C. Sec. 903(d).

subject to regulation by the Commission just as it is when carried by conventional cargo vessels.

Seatrain petitioned for reconsideration of the Commission order. This petition was denied on September 20, 1956 and the Commission made the Division 4 order effective as of October 22, 1956. On October 16, 1956, Seatrain instituted this action. The railroad protestants before the Commission did not join Seatrain in its prosecution of this action.

Seatrain does not urge the Commission exceeded its statutory authority under the Interstate Commerce Act in the exercise of its discretion in the grant of the exemption. Rather, the Commission order is attacked because of alleged lack of jurisdictional findings that the exemption was consistent with the National Transportation Policy and because the exemption allegedly renders discrimination possible and is therefore contrary to the public interest and the National Transportation Policy.

Pan-Atlantic challenges the right of Seatrain to bring this action. Therefore, before the validity of the order may be considered, it must first be determined whether plaintiff has standing to maintain this suit.

Seatrain would circumvent any question of standing by seeking to find an unqualified right to bring this action. This unqualified right would first be found on the theory that intervention by Seatrain in the Commission hearing on the Pan-Atlantic application conferred on Seatrain the right to bring this action. Early in the history of the law of standing there was an implication that intervention before the Commission conferred standing upon one to institute an action to challenge the order of the Commission.[2] This implication has been completely and utterly destroyed by later pronouncements of the Supreme Court. In *Pittsburgh & W. Va. Ry* v. *United*

[2] Chicago Junction Case, 264 U.S. 258 (1924).

States, 281 U.S. 479, 486 (1930), where the District Court based its conclusion that plaintiff had standing partially upon the fact that plaintiff had intervened before the Commission, the Court in reversing the District Court, said: The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it. . . . Accord: *Moffat Tunnel League* v. *United States*, 289 U.S. 113 (1933); *Sprunt & Son* v. *United States*, 281 U.S. 249 (1930); *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76 (E. D. No. 1955), aff'd 350 U.S. 892 (1955), rehearing denied, 350 U.S. 943 (1956).

A second basis advanced by Seatrain in support of its right to maintain this action is that after relief is denied at a rehearing of the Commission, the statute confers an unqualified right to bring an action in the appropriate court. A reading of the applicable statutory provision, 49 U.S.C. Section 17(9) [3] reveals that the provisions of law applicable in the case of suits to enforce, enjoin, suspend or set aside orders of the Commission govern the right to bring this action. In order to proceed under these applicable provisions of law, plaintiff must first establish its standing to use those provisions. The statutory provisions do not confer this right.

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[3] 49 U.S.C. Sec. 17(9).

"(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

In order to determine whether Seatrain has standing, the exact nature of the interest of Seatrain in the exemption order must first be ascertained. This interest must be found in the record, specifically, the complaint and the affidavit accompanying Seatrain's motion for a temporary restraining order.[4]

The complaint charges the exemption order of the Commission is invalid and unlawful in that: (1) the Commission declined to consider or make findings as to whether the exemption would promote adequate service and foster sound economic conditions in transportation and among the several carriers as is required by the National Transportation Policy,[5] (2) the Commission action was arbitrary and capricious and constitutes an abuse of discretion, because the exemption permits the transportation of exempt and regulated freight in a combined dual-operation, creating opportunity for undue and unlawful discrimination, preference and prejudice, contrary to the public interest, the National Transportation Policy and the policy of the Interstate Commerce Act,[6] (3) the Commission failed to make findings relating to the charge that the exemption poses the threat of rate wars and the concomitant dissipation of carrier revenues which would be harmful to the economic stability of national transportation and therefore, contrary to the National Transportation Policy,[7] and (4) the Commission erroneously refused to grant a rehearing to consider a radical shift in the facts which had taken place since the hearing and which altered the future competitive impact of the exemption on existing common carrier services.[8]

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[4] The motion for a temporary restraining order was denied.

[5] Complaint, Sec. 11(a).

[6] Complaint, Par. 11(b).

[7] Complaint, Par. 11(c).

[8] Complaint, Par. 11(d).

Nowhere in the Complaint is there an allegation Seatrain is in any manner adversely affected or subjected to injury of any nature or type. The most Seatrain urges in the Complaint is the public interest in enforcement of the Interstate Commerce Act and the National Transportation Policy was not served when the Commission granted the exemption order. In order to have standing, the Complainant must possess something more than a common concern for obedience to law. See: *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923). The Complaint, considered alone, does not confer standing upon plaintiff to prosecute this action.

If standing is to be found, it must arise from allegations contained in the affidavit of an officer of Seatrain.[9] The gist of the affidavit is that Pan-Atlantic has taken certain measures which place Seatrain at a substantial competitive disadvantage. The first measure complained of is Pan-Atlantic, in anticipation of receiving the exemption, has instituted a policy of absorbing the cost of marine insurance in the published freight rates and charges on rail-water-rail service of dry cargo shipped on converted T-2 type tankers. This insurance charge has traditionally been borne by the shippers or receivers. Consequently, Seatrain has suffered a loss of revenue resulting from a diversion of traffic from Seatrain. It is further alleged, if Seatrain is to meet this competitive disadvantage, it will have to include marine insurance in its rail-water-rail rate structure at a cost of approximately $80,000 per annum in increased operating expense.

The second measure complained of is "that in anticipation of obtaining said exemption, which makes possible the subsidy of the general freight operation by the handling of bulk petroleum, Pan-Atlantic Steamship Corpo-

[9] See note 4. The affidavit accompanied a motion for a temporary restraining order.

ration published, and continues to maintain rates lower than the rates maintained by Seatrain Lines, Inc. . . .", thereby causing an actual diversion of traffic from Seatrain to its irreparable damage.[10]

A third measure complained of is further proposed rate reduction by Pan-Atlantic to a level below that of Seatrain, causing either a further diversion of traffic from Seatrain or requiring Seatrain, if it is to maintain competitive equality, to reduce its rates to the level proposed by Pan-Atlantic, in consequence of which its revenues will be diminished to its irreparable detriment.

Finally, the affidavit alleges Pan-Atlantic is planning to acquire additional capacity which will correspondingly increase the diversion from Seatrain. As a consequence, Seatrain is reluctant to acquire new vessels because of the competitive situation. This reluctance has resulted in an estimated loss of $6,000 in revenue per day per projected vessel. This final allegation does not support standing in plaintiff. At most, it decries the difficulty of making a business decision by reason of the exemption order and alleges future losses of an entirely too speculative nature.

The question becomes one of determining whether actual and prospective diversion of traffic from Seatrain with concomitant loss of revenue caused by actual and proposed rate reductions and absorption of marine insurance charges,[11] confers standing upon plaintiff to attack the exemption order.

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[10] Affidavit of Harry Johnson, Par. 8. An example of representative movements contained in the affidavit alleged a loss of revenues of $140,271.

[11] The allegation that the exemption order enables Pan-Atlantic to absorb without cost to itself, marine insurance charges on the regulated dry cargo which heretofore had been borne by shippers and receivers is nothing but a complaint about rates set by Pan-Atlantic. The only difference is that instead of alleging the

No case has been cited nor has research revealed any decision of the Supreme Court treating standing to attack an Interstate Commerce Commission exemption order. In situations where standing to attack Commission orders has been treated, the particular order under attack concerned adjustment in rates affecting shippers [12] or the grant of new operating rights so as to increase competition for traffic among carriers,[13] or the acquisition in some form of one carrier by another thereby changing

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setting of a lower rate, it is charged Pan-Atlantic provides more service for the same rate in the form of absorption of insurance charges. Therefore, the entire affidavit for purposes of this standing discussion will be viewed as a charge that the exemption order has enabled Pan-Atlantic to have a favorable rate structure on regulated dry cargo resulting in a diversion of traffic from Seatrain.

[12] Youngstown Co. v. United States, 295 U.S. 476 (1935): standing found to permit a shipper to attack an ICC order establishing minimum rates so as to equalize a competitive geographical advantage accruing to certain shippers by reason of new found availability of water transportation; Sprunt & Son v. United States, 281 U.S. 249 (1930): standing denied a shipper to attack a rate order which erased a competitive advantage existing by reason of a prior rate structure; Edward Hines, Trustees v. United States, 263 U.S. 143 (1923): standing denied a shipper to attack an order removing a penalty demurrage charge.

[13] Atchison, Topeka and Santa Fe Ry. Co. v. United States, 130 F. Supp. 76 (E.D. No. 1955), aff'd. 350 U.S. 892 (1955), rehearing denied, 350 U.S. 943 (1956): standing denied a railroad where the order permitted joinder of motor carriers which might result in stronger competition, but did not involve a grant of new operating rights; Alton Railroad Co. v. United States, 315 U.S. 15 (1942): railroads held to have standing to attack an order granting a specialized motor carrier a certificate of public convenience and necessity to serve the same areas serviced by the railroads; Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382 (1932): Ferry Company held to have standing when effect of the order was to grant new operating rights to another ferry to serve some of the same areas theretofore handled by plaintiff Ferry Company.

the competitive situation for other carriers,[14] shippers[15] or other interested parties.[16]

Under recent pronouncements of the Supreme Court, a sufficient showing of detriment to Seatrain has been made to confer standing upon it to challenge the order for alleged lack of jurisdictional findings. In *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), the question was whether a rival station, which would suffer economic injury by the grant of a license to another station, had standing to appeal under the terms of the Act. The court held the "resulting economic injury to a rival station is not, in and of itself and apart from considerations of public convenience, interest or necessity, an element the petitioner (FCC) must weigh, and as to which it must make findings, in passing on an application for a broadcasting license." The court further held petitioner had the requisite standing. In so holding the court pointed out "that while a station license was not a property right, and while the Commission was not bound to give controlling

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[14] Pittsburgh & W. Va. Ry. Co. v. United States, 281 U.S. 479 (1930): standing denied since order could not affect plaintiff in its carrier status (alternative holding); Chicago Junction case, 264 U.S. 258 (1924): carrier had standing where the order resulted in a diversion of traffic from it.

[15] Home Furniture Company v. United States, 271 U.S. 456 (1926): shipper denied standing where order permitting acquisition had the effect of depriving the shipper of service of a competitive line.

[16] Moffat Tunnel League v. United States, 289 U.S. 113 (1933): unincorporated associations who feared acquisition would lessen the possibility of the building of an extension to serve their membership denied standing (alternative holding).

See also: L. Singer & Sons v. Union Pacific Railroad Co., 311 U.S. 295 (1940): standing denied commission merchants to enjoin building of railroad extension even though railroad did not have necessary permission from ICC; and Western Pacific v. Southern Pacific Co., 284 U.S. 47 (1931): standing granted to a competitor carrier where attack was based partially upon the failure to obtain a commission order.

weight to economic injury to an existing station consequent upon the issuance of a license to another station, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission." *Federal Communications Commission* v. *National Broadcasting Company*, 319 U.S. 239, 247 (1943).

The principle that the person with standing represents the public interest and not his own private interest is established by *Federal Communications Commission* v. *Sanders Brothers Radio Station*, supra, as later modified and clarified by *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4 (1942), and *Federal Communications Commission* v. *National Broadcasting Company*, supra. However, in order to avoid clogging of the Courts by reason of mass vindication of the public interest by anyone who might be so inclined, and because of the constitutional requirement of "case or controversy", the one bringing suit must also show personal injury of a substantial character in order to have standing to institute the action. Therefore, as was demonstrated in *Sanders*, the interest asserted on the appeal from the Commission order may very well be different from that which confers standing to appeal.[17]

Applying these general principles to this litigation, it becomes clear Seatrain has the requisite standing to attack the exemption order. Seatrain has alleged injury of a substantial character in the form of actual and projected losses of revenue due to the rate structure of Pan-Atlantic. Seatrain does not seek in this action a declaration that such rates are unjustified. Rather, it seeks to protect the public interest by having the Commission base its decision upon findings under the National Transportation Policy.

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[17] See generally, "Standing to Challenge Governmental Action" by Kenneth Culp Davis, 39 Minn. L.R. 353 (1955).

Such a procedure is not without precedent in cases involving standing to attack orders of the Interstate Commerce Commission. In *Alleghany Corp.* v. *Interstate Commerce Commission*, 25 L.W. 4521 (April 23, 1957), a case involving standing to attack an order of the Interstate Commerce Commission, the Supreme Court found standing on the basis of a threatened financial injury stemming from dilution of plaintiff's interest in a corporation. As a consequence, standing was found to attack a status order, even though such standing would probably have been lacking if only the status order were being attacked.[18] As the status order was the causal source of the order which made possible the threatened injury to plaintiff in *Alleghany Corp.* v. *Interstate Commerce Commission, supra,* so in an analogous fashion, the causal source of Seatrain's injury is the exemption order.[19]

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[18] See: Breswick & Co., v. United States, 138 F. Supp. 123, 131-132 (1956).

[19] In Alleghany Corporation v. Interstate Commerce Commission, 25 L.W. 4251 (decided April 22, 1957), minority common stockholders of Alleghany Corporation brought an action before a three-judge District Court to require the Commission to set aside its order granting Alleghany the status of a "non-carrier to be considered as a carrier" and its subsequent order approving a new class of preferred stock, and to restrain Alleghany from issuing the new preferred stock.

In discussing the contention of Alleghany that the minority stockholders had no standing to attack the Commission orders, the Court states:

"The appellees are common stockholders of Alleghany. The new preferred stock issue approved by the Commission is convertible, and under approved notions of standing, the threatened 'dilution' of the equity of the common stockholders provided sufficient financial interest to give them standing. See American Power & Light Co. v. SEC, 325 U.S. 385, 388-389.

"Having acquired standing to institute proceedings in the District Court by virtue of the threatened financial injury, appellees could also attack the order of the Commission conferring on Alleghany the status of a person not a carrier but to be 'considered as a carrier.' The status order was a source of the

The attack on the Commission order is predicated upon the alleged failure of the Commission to consider the National Transportation Policy and to make findings that the exemption was consistent with the National Transportation Policy. Two questions are raised: (1) did the Commission consider the National Transportation Policy in granting the exemption order, and (2) if the Commission did not consider the National Transportation Policy, was it required to do so when granting an exemption order under 49 U.S.C. Section 903(e)(2).

An examination of the Report of Division 4 of the Commission [20] indicates the Commission did not consider the National Transportation Policy.[21] The report of the Commission states Seatrain "fears that the transportation of exempt and regulated cargo by applicant in the same vessels . . . may result in discriminatory practices contrary to the public interest." While the report of the Commission conclusively shows Seatrain raised this issue, the Commission expressly declined to consider it and limited itself to one issue as follows:

> "The sole issue before us here is to determine whether the transportation by applicant as a contract carrier, which by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to part I, II, or III. If this question is answered in the affirmative, under the provisions of section 303(e)(2)

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threatened financial injury. If the Commission acted out of bounds in decreeing its status order, it had no power to approve the new preferred stock issue and the plaintiffs would be entitled to relief."

[20] No. W-376 (Sub-No. 14), decided July 3, 1956.

[21] However, the absence of destructive competition within the meaning of the National Transportation Policy was incidental to a finding of absence of substantial competition within the meaning of 49 U.S.C. Sec. 903(e)(2).

(49 U.S.C. 903(e)(2))* of the act, we are authorized to exempt by order from the provisions of part III such of the transportation engaged in by applicant as we find necessary to carry out the therein declared policy of Congress. In the circumstances there is no occasion in this proceeding for determining issues relative to discrimination, dual operations under section 310 of the act, or forfeiture of dormant operating authorities." *(Insertion added)

The issue as framed by the Commission is in the language of 49 U.S.C. Section 903(e)(2).[22] The narrow statement of the issue in conjunction with the declaration that there was "no occasion . . . for determining issues relative to discrimination", establishes the Commission did not consider the National Transportation Policy.

This conclusion is not altered by the following language found in the opening paragraph of the Commission report: "Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and are found not justified." If the Commission report were to indicate other alleged necessary criteria and findings were considered, such all embrasive language would be curative.[23] How-

[22] The pertinent portion of 49 U.S.C. Sec. 903(e)(2) is as follows:

"(2) It is declared to be the policy of Congress to exclude from the provisions of this chapter, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this chapter or chapter 1 or 8 of this title. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this chapter such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. . . ."

[23] County Board of Arlington County, Va. v. United States, 101 F. Supp. 328 (E.D. Va. 1951).

ever, in the instant report, the Commission negated its consideration of all questions except "whether the transportation by applicant as a contract carrier, which by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk; is not actually and substantially competitive with transportation by any common carrier subject to part I, II, or III. . . ." Under this circumstance, the record shows the Commission did not consider those various aspects of the National Transportation Policy which were raised and asserted to be of manifest importance.

Whether the Commission had to make jurisdictional findings under the National Transportation Policy when granting an exemption to a carrier under Section 903 (c)(2) is a question of first impression. If one were to accord a literal reading to the National Transportation Policy, remand to the Commission would be necessary because the last sentence of the National Transportation Policy provides: "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." If "all" means "all", the Commission erred by reason of its failure to make jurisdictional findings under the National Transportation Policy.

An examination of the Water Carriers Act,[2] particularly 49 U.S.C. Sections 903(b), (c) and (d), reveals "all", as employed in the National Transportation Policy, means something less than "all". These provisions provide for exemption from regulation without regard to the National Transportation Policy. It is not for this court to say it would be better policy to grant the Commission authority to determine whether proposed exemptions are inimical to the National Transportation Policy.

[2] 49 U.S.C. Sections 901-923.

It suffices that Congress has decided such a Commission determination is not necessary for enjoyment of these exemptions. If the applicant otherwise qualifies, the Commission cannot withhold these exemptions by reason of operating rights under the exemptions being contrary to the National Transportation Policy. By reason of the statute itself, the National Transportation Policy need not, and indeed, cannot be considered in connection with every exemption.

Since the National Transportation Policy does not control enjoyment of all exemptions under Section 903, what is there to indicate this Policy was to be taken into account in the grant of the exemption to Pan-Atlantic under Section 903(e)(2)? Plaintiff argues unless an exemption by its terms is clearly insulated from consideration by the Commission in terms of the National Transportation Policy, the grant of the exemption must be in agreement with the stated aims of the National Transportation Policy. By way of illustration, plaintiff urges the Court to compare Section 903(e)(1) with Section 903(e)(2).

49 U.S.C. Sec. 903(e)(1) provides:

> "(e)(1) Notwithstanding any provision of this chapter the Commission may, by order, from time to time, upon application, or upon its own initiative without application, exempt from the requirements of this chapter the transportation of passengers between points in the United States by way of a foreign port or ports, upon a finding that application of such requirements thereto is not necessary to carry out the national transportation policy declared in this chapter and chapters 1, 8 and 13 of this title."

49 U.S.C. Sec. 903(e)(2) insofar as here pertinent provides:

> "(2) It is declared to be the policy of Congress to exclude from the provisions of this chapter, in

addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this chapter or chapter 1 or 8 of this title. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this chapter such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. . . ."

Plaintiff urges the language of Section 903(e)(1), "notwithstanding any provision of this chapter" is so strong as to have caused Congress to fear the exemption would be insulated from the National Transportation Policy. In order to avoid this result plaintiff states Congress brought the exemption back within the coverage of the National Transportation Policy by virtue of the last clause of Section 903(e)(1). Plaintiff then argues that the language of Section 903(e)(2), "it is declared to be the policy of Congress to exclude from the provisions of this chapter" is so weak when compared with the opening language of Section 903(e)(1), that Congress could not have meant to eliminate all consideration of the National Transportation Policy since it knew how to do so as shown by the beginning language of Section 903(e)(1). This argument is not convincing.

The Act provides for absolute exemptions[25] and qualified exemptions.[26] Exemptions are absolute in the sense that carriers may operate free from Commission regulation or scrutiny if specified conditions are satisfied.

[25] 49 U.S.C. Sections 903(b), (c) and (d).

[26] 49 U.S.C. Sections 903(e)(1), 903(e)(2) and 903(g).

Exemptions are qualified in the sense that the Commission by order can create an exemption[27] or remove an otherwise existing exemption.[28] With respect to each type of qualified exemption, Congress has spelled out the basis upon which such exemption is to be extended or withdrawn by Commission order. Whether a carrier operates under a 903(e)(1) exemption or a 903(g) exemption is dependent upon whether operation under such an exemption would be consistent with achievement of the aims of the National Transportation Policy. On the other hand, in Section 903(e)(2) no mention is made of the National Transportation Policy. Rather, the basic consideration is whether transportation by contract carrier is actually and substantially competitive with transportation by any carrier subject to the water, rail or motor provisions of the Interstate Commerce Act. If it is found such transportation is not substantially competitive, either by reason of the inherent natur of the commodities transported, their requirement of special equipment or their shipment in bulk, the Commission may exempt so much of such transportation as is necessary to accomplish the stated policy of Congress to exclude such transportation from regulation.

Stated differently, the exemption provisions found in 49 U.S.C. Section 903 are nothing more than legislative policy determinations that the ends of National Transportation would best be served either by non-regulation in all instances,[29] by non-regulation except where necessary to carry out the stated ends of the National Transportation Policy,[30] or by non-regulation where there is

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[27] 49 U.S.C. Sections 903(e)(1) and 903(e)(2).

[28] 49 U.S.C. Section 903(g); see, Section 903(1).

[29] 49 U.S.C. Sections 903(b), (c) and (d).

[30] 49 U.S.C. Sections 903(e)(1) and 903(g).

absent substantial competition with regulated carriers for any one of three reasons.[31]

With respect to certain of the exemptions the Commission has no power to grant or withhold them.[32] But where the statute does empower the Commission to grant or withhold an exemption,[33] it also spells out the considerations upon which that power should be exercised. These considerations vary with the type of exemption. If the Commission were to exercise its power and grant or withhold an exemption upon a consideration other than that stated in the statute in relation to any particular exemption, the Commission would have erred. In granting exemptions under Section 903(e)(2), accomplishment of the aims of the National Transportation Policy is not set forth as a consideration upon which the Commission should grant an exemption.

The essential finding here is whether the exemption of the transportation applied for was actually and substantially competitive with transportation by common carriers subject to part I, II or III of the Act. The Commission found it was not because of the requirement of special equipment or shipment in bulk. The report discloses ample facts to substantiate this finding. The Commission did not act arbitrarily or capriciously. Nothing more was necessary to the validity of its order.

There are cases with statements to the effect that all relevant factors of the National Transportation Policy must be at least considered in every proceeding of the Commission,[34] or the National Transportation Policy must

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[31] 49 U.S.C. Section 903(e)(2).

[32] 49 U.S.C. Sections 903(b), (c) and (d).

[33] 49 U.S.C. Sections 903(e)(1), 903(e)(2) and 903(g).

[34] See Cantlay & Tanzola, Inc. v. United States, 115 F. Supp. 72 (S.D. Cal. 1953).

serve as a guide to the Commission in all its decisions.[35] However, these statements are found in cases arising under the rate provisions of the Act or in connection with the granting of a certificate of convenience and necessity. These statements are not found in cases dealing with exemptions from regulations under Section 903(e)(2) of the Act.

The motion to dismiss the complaint of the plaintiff, Seatrain, is granted. An order in accordance herewith may be submitted.

At Wilmington,
May 23, 1957

[35] See Luckenbach S. S. Co. v. United States, 122 F. Supp. 824 (S.D. N.Y. 1954).

INTERSTATE COMMERCE COMMISSION

No. W-376 (Sub-No. 14)

PAN-ATLANTIC STEAMSHIP CORPORATION
EXEMPTION APPLICATION

Decided July 3, 1956.

Transportation by applicant as a contract carrier of crude petroleum and specified petroleum products, in bulk, in tankers, between Louisiana and Texas Gulf ports, and Atlantic ports, north of, and including Norfolk, Va., found to be such as it is the policy of Congress to exempt from the provisions of Part III of the Interstate Commerce Act. Exemption order entered.

William H. Armbrecht, Jr., and *Warren Price, Jr.*, for applicant.

S. S. Eisen, R. B. Kelly, Richard A. Hollander, James W. Nisbet, and *Robert J. Bernard* for protestants.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MITCHELL, CLARKE, and HUTCHINSON by Division 4:

Exceptions to the report proposed by the Examiner were filed by Seatrain Lines, Inc., Seaboard Airline Railroad Company, Southern Railway System lines, and rail carriers in southwestern territory to which applicant replied. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and are found not justified.

By application filed August 8, 1955, as amended, Pan-Atlantic Steamship Corporation seeks an order under section 303(e)(2) of the Interstate Commerce Act excepting from the provisions of Part III thereof transportation by it as a contract carrier of crude petroleum, motor fuel, gasoline, gas oil, distillate fuel oil, kerosene, fuel oil, and bunker oil in bulk, hereinafter called bulk petroleum, in the tanks of its vessels, when such vessels also are used to transport commodities subject to regulation, between Louisiana and Texas Gulf of Mexico ports on the one hand, and on the other, Atlantic ports including Norfolk, Va., and ports north thereof. Seatrain Lines, Inc., and certain rail carriers in southern and southwestern territories oppose the granting of the exemption sought.

In No. W-376 and subnumbers, applicant is authorized to transport passengers and commodities generally between specified Atlantic and Gulf ports. It also holds temporary authority in No. W-376 (Sub-Nos. 11 and 12) to transport property and passengers in the Atlantic-Pacific intercoastal trade and passengers in the Gulf-Pacific intercoastal trade. Under the Atlantic-Gulf coastwise authority transportation presently is performed with conventional dry-cargo break-bulk type of vessels. While applicant's certificate authorizes service in this trade as far west as Galveston and Houston, Texas, its operation extends to New Orleans, La., only, and service at the latter port is limited to the discharge of southbound cargo.

Applicant recently acquired two T-2 type tankers which are equipped with decks suitable for the transportation thereon of dry-cargo. It is now operating these vessels between Louisiana and Texas ports and north Atlantic ports in the movement of bulk petroleum which transportation is exempt from regulation by the Commission. If the exemption here sought is granted, applicant would

continue its transportation of bulk petroleum as an exempt operation while utilizing the decks of its tankers for the carriage thereon of general commodities in containers and truck trailers between the ports it presently is authorized to serve. The exemption under which the commodity in bulk now moves does not apply to applicant's proposed operation as the tankers no longer would be used exclusively in transporting bulk petroleum, and unless the instant application is granted, applicant's proposed transportation, including bulk petroleum, would be subject to regulation.

Applicant contends that its transportation of bulk petroleum is not actually and substantially competitive with transportation by any common carrier subject to part I, II, or III of the act. Bulk petroleum is generally transported from Gulf to Atlantic ports in tankers designed and operated exclusively for the transportation of these commodities. A small portion also moves by tankers from Atlantic to Gulf ports. The tankers are operated by petroleum companies engaged in transporting their own products as private carriage, or by carriers for hire which transport specific cargoes in full shiploads under individual contracts. Under Maritime law the carriers have been consistently regarded as contract (private) carriers, and their operations are exempt from regulation pursuant to the provisions of section 303(d) of the act. The transportation charges of these carriers not only fluctuate frequently, but are substantially lower than the charges of railroads or other common carriers.

During the years 1951, 1952, and 1953, the water-borne traffic in bulk petroleum between the Gulf coast and north Atlantic ports ranged from slightly less than 74 million tons to somewhat in excess of 76 million tons annually. The movement of bulk petroleum between points in Texas and Louisiana and points in the north Atlantic States by rail was from 344,500 tons to 464,800 tons annually. Thus the movement of this traffic by rail

approximates only about one half of one percent of the movement by water.

Protestants contend (1) that the transportation of the commodities for which exemption is sought herein would be in substantial competition with the movement by rail of the same commodities; (2) that authorization of the exemption would violate the intent of section 310 of the act inasmuch as applicant, a certificated common carrier, would be enabled to transport commodities in contract and common carriage on the same vessels; and (3) that applicant's proposed operation contemplates reactivation of operating authority now dormant contrary to the public interest. Protestant Seatrain, in addition, states that it fears that the transportation of exempt and regulated cargo by applicant in the same vessels as proposed herein may result in discriminatory practices contrary to the public interest.

Rail carriers show that they transport petroleum among other commodities from Texas and Louisiana ports to the eastern seaboard. During a 3½-year period from 1952 to mid-1955 a subsidiary of the Missouri Pacific Railroad Company transported 318 carloads of 7,976 tons of petroleum products from New Orleans to eastern points. During the same period the Missouri Pacific transported 186 carloads, or 3,642 tons, of the same commodity. The Texas and New Orleans Railroad Company shows that it transports petroleum from producing points on its rails to destinations in West Virginia, Virginia, Pennsylvania, Maryland, New Jersey, Delaware, New York, and New England. These protestants show further that water-borne petroleum traffic from points on the Gulf of Mexico to all points has increased in recent years and that the receipt of petroleum by water at north Atlantic ports from all origins also has increased recently while the petroleum originated by the southwestern railroads destined to points in the United States generally and that terminated by the eastern railroads from

all origins in the United States has decreased somewhat in the last six years. The tonnage figures shown by protestants include traffic moving generally between wide areas of origin and destination, and no showing is made what portion of the traffic actually moves between north Atlantic and Gulf ports. Seatrain urges that Pan-Atlantic's non-used operating rights are dormant and that so much of the rights as pertain to abandoned operations be forefeited for nonuser.

The sole issue before us here is to determine whether the transportation by applicant as a contract carrier which by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to part I, II, or III. If this question is answered in the affirmative, under the provisions of section 303(e)(2) of the act, we are authorized to exempt by order from the provisions of part III such of the transportation engaged in by applicant as we find necessary to carry out the therein declared policy of Congress. In the circumstances there is no occasion in this proceeding for determining issues relative to discrimination, dual operations under section 310 of the act, or forfeiture of dormant operating authorities.

The record indicates that applicant in its transportation of bulk petroleum must meet competition of private carriers or other carriers exempted from regulation, and that in view of the movement in large volume, and the fluctuating and lower transportation charges of exempt water carriers, such commodities are not readily susceptible of transportation between Gulf and Atlantic ports by common carriers subject to part I, II, or III of the act. In *Seatrain Lines, Inc., Exemption Application—Oil,* 265 I.C.C. 806 (decided July 19, 1949—not printed) an order was entered exempting from regulation operation by protestant Seatrain as a contract car-

rier in the transportation of crude petroleum and specified petroleum products in the side tanks of its vessels from Texas City, Tex., and New Orleans to New York, N. Y. In connection with this action the Commission, division 4, made the following findings:

> Because liquid petroleum in bulk can be carried so cheaply by tanker from the Gulf to north Atlantic ports, rail carriers are as a practical matter excluded from this business by the tankers operating in that trade. Therefore, wholly aside from the present or prospective operation of applicant, it clearly appears that common carriers subject to the act do not effectively compete for this traffic. The evidence is convincing that the proposed transportation by applicant would not be actually and substantially competitive with transportation by rail, motor, or water common carriers subject to the act.

The same conclusions are warranted here.

Rail protestants on exceptions cite *Nicolson Transit Co., Exemption application,* 285 I.C.C. 637, and take the position that the Commission as a matter of policy does not permit the holding of authority to engage in regulated transportation with vessels which are loaded with commodities exempt from regulation. The cited proceeding does not establish this principle which, in our opinion, would not be in harmony with the Congressional policy as stated in section 303(e)(2) of the act.

We find that the transportation by applicant as a contract carrier of crude petroleum, motor fuel, gasoline, gas oil, distillate fuel oil, kerosene, fuel oil, and bunker oil, in bulk, between Louisiana and Texas ports and Atlantic ports, north of and including Norfolk, is transportation which it is the policy of Congress, as declared in section 303(e)(2) of the act, to exclude from the provisions of part III thereof, and which, by reason of the requirement of special equipment or shipment in bulk,

is not actually and substantially competitive with transportation by any common carrier subject to part I, II or III of the act; and that the exemption of such transportation from regulation is necessary to carry out the declared policy of Congress.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 3rd day of July, A. D. 1956.

No. W-376 (Sub-No. 14)

PAN-ATLANTIC STEAMSHIP CORPORATION EXEMPTION APPLICATION

Pan-Atlantic Steamship Corporation having made application under the provisions of section 303(e)(2) of the Interstate Commerce Act for an order exempting certain transportation from the provisions of part III of the act, a hearing having been held, and a full investigation of the matters and things involved having been made, and said division on the date hereof having made and filed a report containing its findings of fact and conclusions therein, which report is hereby referred to and made a part hereof:

It is ordered, That transportation by applicant as a contract carrier of crude petroleum, motor fuel, gasoline, gas oil, distillate fuel oil, kerosene, fuel oil, and bunker oil, in bulk between Louisiana and Texas Gulf ports and Atlantic ports north of and including Norfolk, Va., be, and it is hereby excluded from the provisions of part III of the Interstate Commerce Act until further order of the Commission.

It is further ordered, That this order shall take effect on and be in force on and after August 20, 1956.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(SEAL)

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at is office in Washington, D. C., on the 20th day of September, A. D. 1956.

No. W-376 (Sub-No. 14)

PAN-ATLANTIC STEAMSHIP CORPORATION
EXEMPTION APPLICATION

Upon consideration of (1) the record in the above-entitled proceeding, (2) petition of Seatrain Lines, Inc., protestant, for reopening, further hearing, and reconsideration by, and oral argument before, the entire Commission, and (3) applicant's reply to the petition:

It is ordered, That the petition be, and it is hereby, denied, for the reasons that the findings of fact in the report of the Commission are fully supported by the record, and the conclusions are based on substantial evidence; and that the petition does not show sufficient grounds to warrant reopening the proceeding for further hearing and reconsideration by, and oral argument before, the entire Commission.

It is further ordered, That the order dated July 3, 1956, in the above-entitled proceeding, which, pursuant to section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petition, be, and it is hereby, reinstated and further modified so as to become effective October 22, 1956.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

Office - Supreme Court, U.S.
FILED
NOV 13 1957
JOHN T. FEY, Clerk

No. 522

IN THE

Supreme Court of the United States

October Term, 1957

SEATRAIN LINES, INC.,
Appellant

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellees

On Appeal from the United States District Court for the District of Delaware

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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In The

Supreme Court of the United States

October Term, 1957

No. 522

Seatrain Lines, Inc.,

Appellant

v.

United States of America
Interstate Commerce Commission
Pan-Atlantic Steamship Corporation,

Appellees

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

We agree that the sole issue is whether the Interstate Commerce Commission

> "may grant an exemption under Sec. 303(e)(2) * * * without making *jurisdictional findings* that the exemption is consistent with and will effectuate the national transportation policy." P.A. Br. 3.[1] (emphasis supplied throughout)

See also U.S. Br. 3-4.

Significantly, neither Pan-Atlantic nor the government comment upon our detailed refutation in the Jurisdictional Statement of the district court's analysis but content themselves with quoting or paraphrasing its opinion.

[1] The Motion to Affirm of Pan-Atlantic S.S. Corp. is hereinafter cited as P.A.Br., that of the government as U.S. Br.

1) Pan-Atlantic sets out the conditions upon which an exemption may issue under 303(e)(2), and paraphrasing the court below, concludes that

> "If the Commission should grant or withhold an exemption based on considerations other than those specifically included in the section, clearly it would err. Whether or not the grant of an exemption under Section 303(e)(2) would accomplish the purposes of the national transportation policy is not one of the considerations set forth in the Act." P.A. Br. 6. See also U.S. Br. 6.

By such logic the Commission would also be absolved, for example, from giving effect to the NTP in granting certificates of convenience and necessity under Sec. 309(c), 49 U.S.C. Sec. 909(c), because that section is no less self-contained and also lays down its own special "considerations", namely, that

> "the Commission finds that the applicant is fit, willing and able properly to perform the service proposed * * * and that the proposed service * * * is or will be required by the present or future public convenience and necessity * * *."

Plainly the NTP is not "one of the considerations set forth in" Sec. 309(c). Yet, says the government, the NTP "is obviously applicable" to "certificates of public convenience and necessity". U.S. Br. 5. Why should the NTP word "all" be so "obviously applicable" in the one case and not in the other?

Apparently the distinction relied upon by appellees is that the Sec. 303(e)(2) power to grant exemptions is couched in terms of "*policy*", and both appellees argue that that "policy" overrides the policy of the NTP. U.S. Br.4-6; P.A.Br.4. But why must the categorical directive of 309(c)—that the Commission "shall" issue a certificate upon finding the above-mentioned "considerations"—yield to the NTP if the 303(e)(2) permissive expression of "policy" to grant rather than a directive to do so is to override the NTP? Manifestly that is absurd.

When Congress desired to insulate certain provisions from the remainder of the Act, it did not leave the matter to vague implications but did so in unmistakable terms, as in Sec. 303(e)(1), which authorizes the grant of an exemption "from the requirements of this part" "notwithstanding any [other] provision of this part".

Nor is appellees' position improved when the "policy" of 303(e)(2) is labelled "special" with the alleged consequence that it must therefore override the "general" policy of the NTP. U.S.Br. 6; P.A.Br.4. Only

> "where there is inconsistency between general and special provisions of an act, [do] the latter control." *United States* v. *Mattio*, 17 F. (2d) 879, 880.

And see *Callahan* v. *United States*, 122 F.(2d) 216, 217. Pan-Atlantic itself stated in its brief (p. 13) in the court below that

> "there is clearly no conflict or inconsistency between the provisions of Sec. 303(e)(2) and the national transportation policy."

This was likewise the government's position in the court below. See Jurisdictional Statement, p. 6. Were a conflict to be spelled out because 303(e)(2) lays down the particular "considerations" upon which an exemption may issue, then the "special" considerations which govern the issuance of certificates of convenience and necessity and the like would likewise conflict with the NTP. The resultant of such reasoning would be complete frustration of the Congressional intention that "all provisions" of the Act shall be governed by the NTP.

2) In citing *United States* v. *Louisiana*, 290 U.S. 70, 80, and *Ward Transport* v. *United States*, 125 F. Supp. 363, for the proposition that the Commission need not in certain circumstances make "detailed findings of fact", P.A.Br.6-7, Pan-Atlantic forgets that the issue is whether the Commission may grant the Sec. 303(e)(2) exemption "without making *jurisdictional* findings". P.A.Br.3.

We have never insisted upon "detailed findings of fact", i.e. of the "evidentiary facts", to which *Wards* adverts. We complain of the absence of a "basic" finding of "ultimate fact", a *jurisdictional* finding which responds to the mandate of the statute.

It may be noted that *Alabama Great Southern Railroad Co.* v. *United States*, 340 U.S. 216, which is cited in the *Ward* fragment quoted by Pan-Atlantic, (P.B. Br. 7), held that Sec. 14(1) of the Act, which was amended in 1906 to relieve the Commission of making findings of fact,

> "does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order." 340 U.S. at 228.

And Sec. 8(b) of the Administrative Procedure Act (5 U.S.C. Sec. 1007(b)), which requires "all" agency decisions to "include a statement of findings", is applicable to the Commission, *Atlanta & St. Andrews Bay Ry. Co.* v. *United States;* 104 F. Supp. 193, 200. Finally, there is no room for an "implied" finding, as in the *Ward* case, because the district court found that the Commission "expressly declined to consider" and "did not consider" the NTP. Appendix B (to our Juris. Statement) pp. 15A-16A.

3) Pan-Atlantic alleges that "appellant holds the same exemption that it now seeks to deny to Pan-Atlantic",[2]

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[2] The exemption was not in fact the "same". Seatrain obtained an exemption for the carriage of oil in side-tanks, which meant the carriage of 1200 tons on 4 of its smaller ships and 1700 tons on two others. The exempt traffic contributed just 9/10 of 1% of its total revenue, R.88, 98; whereas Pan-Atlantic could carry 14,000-15,000 tons of unregulated oil (i.e. about 10 times as much Seatrain) and 1200-1500 tons of regulated traffic on its northbound voyages, R.25., a difference which makes possible the use of unregulated oil rates to manipulate the rates for common carriage.

P.A.Br.2, and the government states that in the prior Seatrain case, Seatrain urged that its exemption was required by the NTP. U.S.Br.2-3. The grant of one certificate of convenience and necessity, or of one exemption, does not, of course, require the automatic grant of a string of others. Each successive application must stand upon its own bottom and in each case the Commission must comply with the law. Assume the existence in the record of facts upon which a finding in consonance with the NTP could be made, the failure of the Commission to consider and make a finding with respect to the NTP, Appendix B, p. 15 A, cannot be remedied by the courts, for they are not authorized

> "to make findings and substitute them for those of the Commission." *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634.

To the same effect, *Florida* v. *United States*, 282 U.S. 194, 215.

For the reasons set forth in our Jurisdictional Statement, we submit that the decision below is in error and that the judgment of the district court should be reversed.

Respectfully submitted,

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Attorney for Appellants

Of Counsel
Raoul Berger

Office - Supreme Court, U.S.
FILED
OCT 29 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 522

SEATRAIN LINES, INC., *Appellant*

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellees

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pan-Atlantic Steamship Corporation, hereinafter sometimes called Pan-Atlantic, one of the appellees in the above-entitled case, moves to affirm the judgment of the district court on the ground that the question presented is so unsubstantial as not to require further argument.

This is a direct appeal from the final judgment entered on June 17, 1957, by the United States District Court for the District of Delaware, dismissing an

action to set aside an order of the Interstate Commerce Commission.

Appellee, Pan-Atlantic, is a common carrier by water authorized by the Interstate Commerce Commission to transport, insofar as here relevant, commodities generally in interstate and foreign commerce between specified Atlantic coast ports and between Atlantic coast and Gulf of Mexico ports. In addition to its fleet of conventional C-2 type dry cargo vessels, Pan-Atlantic has acquired tankers of the T-2 type, which have been equipped with cargo decks to permit the transportation thereon of containers and truck trailers. The transportation of bulk petroleum alone in a given vessel is exempt under Section 303(d) of the Interstate Commerce Act (49 U.S.C. 903(d)). Pan-Atlantic is presently transporting, and desires to continue to transport, in its converted tankers not only bulk petroleum in the tanks, but also as deck loads in truck trailers or containers the general commodities that its certificate, issued by the Commission, authorizes it to transport. This cannot be done without subjecting the bulk petroleum to regulation in the absence of an order of exemption issued by the Commission under Section 303(e)(2) of the Interstate Commerce Act (49 U.S.C. 903(e)(2)).

Appellant, Seatrain Lines, like Pan-Atlantic, is a common carrier by water authorized by the Commission to transport commodities generally in interstate and foreign commerce between specified Atlantic coast ports and between Atlantic coast and Gulf of Mexico ports. Appellant holds the same exemption that it now seeks to deny to Pan-Atlantic, on virtually the identical bulk petroleum commodities, pursuant to the Commission's order in *Seatrain Lines, Inc., Exemption*

Application—Oil, Docket No. W-543, Sub. No. 1, decided July 19, 1949 (not printed).

By its Report and Order of July 3, 1956, Division 4 of the Interstate Commerce Commission found unanimously that the transportation by Pan-Atlantic as a contract carrier of certain bulk petroleum commodities between Louisiana and Texas ports and Atlantic ports, north of and including Norfolk, "is transportation which it is the policy of Congress, as declared in Section 303(e)(2) of the Act (Title 49 U.S.C. 903(e)(2)), to exclude from the provisions of Part III thereof, and which, by reason of the requirement of special equipment or shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to Part I, II or III of the Act; and that the exemption of such transportation from regulation is necessary to carry out the declared policy of Congress."[1] By order of September 20, 1956, the entire Commission by unanimous vote denied Seatrain Lines' petition for reopening of the proceeding, for further hearing, for reconsideration by, and oral argument before, the entire Commission. Thereupon the Commission's order of exemption became effective October 22, 1956.

Appellant's subsequent complaint to the lower court was dismissed by order entered June 17, 1957. The sole issue raised by the instant appeal is whether the Interstate Commerce Commission may grant an exemption under Section 303(e)(2) of the Interstate Commerce Act (49 U.S.C. 903(e)(2)) without making jurisdictional findings that the exemption is consistent with and will effectuate the national transportation policy (49 U.S.C. preceding § 1).

[1] Jurisdictional Statement of Appellant, pp. 28A and 29A.

The pertinent portion of the section of the Interstate Commerce Commission under which the exemption order in question was granted (Section 303(e)(2); 49 U.S.C. 903(e)(2)) reads as follows:

> "It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II."[1]

The national transportation policy is a general declaration of congressional policy intended as a guide in the administration of the Interstate Commerce Act as a whole. Section 303(e)(2), on the other hand, is by its terms, a *specific* declaration of congressional policy. Indeed, the first words of this subsection are *"It is hereby declared to be the policy of Congress * * *"* to exclude from regulation certain types of transportation. It is a well-known rule of statutory construction that specific provisions of a statute take precedence over general provisions. In *Clifford F. MacEvoy Co. v. United States*, 322 U. S. 102, for example, at page 107, the following appears:

> "However unusual may be the general language of a statute *'it will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' Ginsberg and Sons v. Popkin*, 285 U. S. 204, 208, 52 S. Ct. 322, 323." (Emphasis added)

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[1] Juridictional Statement of Appellant, page 2.

As the district court stated, exemptions provided for under Part III of the Interstate Commerce Act may be divided into three types. Sections 303(b), (c) and (d) (49 U.S.C. 903(b), (c) and (d))[1] by their specific terms flatly exempt certain types of water transportation from the provisions of the Act. These sections amount to a determination of legislative policy that the ends of national transportation will best be served by non-regulation in these particular areas. The second type of exemption is represented by the provisions of Sections 303(e)(1) and 303(g) (49 U.S.C. 903(e)(1) and 903(g))[2] Those sections provide for non-regulation except where necessary to carry out the stated ends of the national transportation policy. The third type of exemption is provided by the section here at issue, Section 303(e)(2). In that section non-regulation is ordered where there is an absence of competition with regulated carriers for any one of three reasons. In the second type of exemption referred to above the Congress made specific reference to the national transportation policy. In the third, no such reference appears.

The provisions of Section 303(e)(2) are clear and definite, incapable of dual interpretation. They provide that if in a given case the Commission shall find that the transportation by a contract carrier by water, by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to Parts I, II, or III of the Act, the Commission, shall exempt that transportation from the

[1] Jurisdictional Statement of Appellant, page 1A.

[2] Ibid., page 2A.

provisions of the Act. Thus Section 303(e)(2) carefully spells out the considerations upon which the Commission's power to grant an exemption shall be exercised. If the Commission should grant or withhold an exemption based on considerations other than those specifically included in the section, clearly it would err. Whether or not the grant of an exemption under Section 303(e)(2) would accomplish the purposes of the national transportation policy is not one of the considerations set forth in the Act. The Commission correctly refused to read that consideration into the section and thereby to make a finding that would have been at the very least gratuitous. Instead it properly limited itself to a finding that the considered transportation is not actually and substantially competitive with transportation by common carriers subject to Part I, II or III of the Act because of the requirement of special equipment or shipment in bulk. As the district court found, the Commission's report discloses ample facts to substantiate this finding, nor is that denied here by the appellant.

Whether or not a finding by the Commission that the exemption granted to Pan-Atlantic Steamship was in accordance with the national transportation policy would have been a proper finding, manifestly it would have been an unnecessary one. The courts have never insisted upon detailed findings in Commission reports so long as "the report read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data * * *". *United States* v. *Louisiana*, 290 U. S. 70, 80. The appellant appears to argue that the Interstate Commerce Commission, by its own statement, did in fact consider the national transportation policy in arriving at its decision, even though

it made no specific finding with respect thereto. (Juris. Statement, p. 6) It would appear, therefore, that the appellant's complaint runs not so much to the failure of the Commission to give consideration to the policy, as to its failure to make a specific finding regarding it.

In *Ward Transports* v. *United States*, 125 F. Supp. 363, (D.C. Col., 1954) affirmed per curiam without opinion 348 U.S. 979, 75 St. Ct. 570 (1955), the lower three-judge court had the following to say (p. 368):

> "The plaintiffs next contend that the Commission's report and order are not supported by adequate findings. In answer to this contention it seems sufficient to say that the Commission by its positive findings impliedly made the negative findings which the truck companies insist should have been made. Further, the Supreme Court has held that the Interstate Commerce Act does not compel the Commission to make detailed findings of fact except in a case where damages are awarded, but only requires the Commission to file a written report stating its conclusions, together with its decision and order, and where the Commission sufficiently discloses the essential basis of its judgment in its report the Court will not set that report aside. *Alabama Great Southern Railroad Co.* v. *United States*, supra, 340 U.S. at pages 227-228, 71 S. Ct. 246; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535, 66 S. Ct. 687, 90 L.Ed. 821."

That language is particularly applicable in the instant proceeding. Especially in view of the explicitness and self sufficiency of Section 303(e)(2), a specific finding by the Commission with regard to the national transportation policy or any other provision of the Act, would have been surplusage. As the Supreme Court stated in *Alabama Great S. R. Co.* v. *United*

States, 340 U. S. 216, 227-8, "* * * the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented." For the reasons stated, the "statutory authority" here invoked and the "context of the situation presented" required no specific finding by the Commission with respect to the provisions of national transportation policy.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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October 29, 1957

Certificate of Service

I, Warren Price, Jr., one of the attorneys for Pan-Atlantic Steamship Corporation, an appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 29th day of October, 1957, I served copies of the foregoing Motion to Affirm on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to the office of Leonard G. Hagner, Esq., United States Attorney, Federal Building, Wilmington, Delaware, and by mailing a copy in a duly addressed envelope, with first class postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert W. Ginnane, Esq., its Chief Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Seatrain Lines, Inc., appellant, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorneys S. S. Eisen, Esq., 140 Cedar Street, New York, N. Y., and Raoul Berger, Esq., 1108 Sixteenth Street, N. W., Washington 6, D. C.

WARREN PRICE, JR.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 31 1957
JOHN T. FEY, Clerk

No. 522

In the Supreme Court of the United States

OCTOBER TERM, 1957

SEATRAIN LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered June 17, 1957, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The order, which was issued under the provisions of Section 303 (e) (2) of the Act, 49 U. S. C. 903 (e) (2), exempted from Part III of the Interstate Commerce

Act certain transportation engaged in by appellee Pan-Atlantic Steamship Corporation (Pan-Atlantic).

By the terms of Section 303 (d), 49 U. S. C. 903 (d), bulk petroleum, when carried alone in a vessel, is exempt from regulation under Part III of the Act. However, when regulated dry cargo is carried on the same vessel the bulk petroleum is subject to regulation unless an exemption order is obtained from the Commission under Section 303 (e) (2).

Pan-Atlantic, which presently possesses authority from the Commission to transport passengers and general commodities (J. St. 24A–25A), sought such an exemption order by application filed with the Commission on August 22, 1955. Appellant Seatrain Lines, Inc. (Seatrain) and certain railroads opposed the exemption upon the grounds that transportation of the commodities for which exemption was sought would be in substantial competition with movement of the same commodities by rail, and that grant of the exemption would permit Pan-Atlantic, a certificated common carrier, to carry commodities on the same vessels as both a contract and a common carrier, contrary to the intent of Section 310 of the Act (J. St. 26A).[1] On July 3, 1956, Division 4 of the Commission

[1] Seatrain, as a result of the Commission's action in *Seatrain Lines, Inc., Exemption Application—Oil*, 265 I. C. C. 806 (July 19, 1949, not printed in full) obtained an order of exemption similar to that requested by Pan-Atlantic (J. St. 4A–5A, 27A–28A). No findings under the National Transportation Policy were made by the Commission in that proceeding despite the charge by the railroads that the Commission in granting the application of Seatrain had "absolutely disregarded" any consideration of the National Transportation Policy. In answer to the charge, Seatrain asserted that not

issued the requested exemption order and ruled (J. St. 27A):

> The sole issue before us here is to determine whether the transportation by applicant as a contract carrier which by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to part I, II, or III. If this question is answered in the affirmative, under the provisions of section 303 (e) (2) of the act, we are authorized to exempt by order from the provisions of part III such of the transportation engaged in by applicant as we find necessary to carry out the therein declared policy of Congress. * * *

On September 20, 1956, Seatrain's petition for reconsideration of the order was denied, and the Commission made the order effective as of October 22, 1956. Seatrain then brought this action to set aside the Commission's order. The district court unanimously held that findings in terms of the National Transportation Policy (54 Stat. 899, 49 U. S. C. preceding § 1) are not necessary when granting an exemption to a carrier pursuant to the express declaration of Congressional policy contained in Section 303

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only was the exemption of its bulk oil movement required by Section 303 (e) (2) and the Congressional policy declared therein, but by the National Transportation Policy as well, since the order of exemption would "promote economical and efficient transportation service by carriers, sound economic conditions in transportation, and reasonable charges for transportation service."

(e) (2). The correctness of this ruling is the only issue presented in this appeal.

ARGUMENT

The question before the Commission was whether the transportation conducted by Pan Atlantic, as a contract carrier by water, fulfilled the qualifications of Section 303 (e) (2) of the Act [2] for an order by the Commission exempting such transportation pursuant to the declared policy of Congress contained in that subsection. If the Commission determines that the transportation does in fact qualify under the exemption provisions of Section 303 (e) (2), then by the terms of the section it becomes the duty of the Commission to exempt such transportation from the provisions of the Act.

Appellant's attack upon the Commission's order is grounded upon the concluding sentence of the National Transportation Policy declaration: "All of the provisions of this Act shall be administered and enforced

[2] Section 303 (e) (2) provides in part:

> It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier * * * the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared.

with a view to carrying out the above declaration of policy." But, as the court below pointed out, the Water Carrier Act (Part III of the Interstate Commerce Act) grants certain absolute exemptions from its provisions (J. St. 19A–20A). Conduct which is within the scope of these exemptions, being excluded from the Act's regulatory provisions, is also excluded from application to it of the National Transportation Policy. These absolute exemptions represent, in effect, a legislative determination that the needs of the National Transportation Policy are best served by non-regulation.

Section 303 (e) (2) likewise provides an absolute exemption provided certain facts are found to exist. Upon the making of such findings, including the finding that the exemption is necessary to carry out the policy declared in the section, the exemption becomes mandatory. The cases cited by appellant as being in conflict with the decision of the court below (J. St. 5) are rate cases or involve certificates of public convenience and necessity as to which the National Transportation Policy is obviously applicable, and have no bearing on the applicability of the Policy to the exemption provisions of Section 303 (e) (2).

In contrast with certain other exemption provisions of Section 303, such as found in 303 (e) (1) and 303 (g), 49 U. S. C. 903 (e) (1) and 903 (g), which are made expressly subject to the National Transportation Policy, the exemption provisions of Section 303 (e) (2) not only do not refer to the National Transportation Policy, but contain an explicitly different declaration of policy. The section declares: "It is hereby declared

to be the policy of Congress to exclude from the provisions of this part" certain transportation if for any of three specified reasons it is not "actually and substantially competitive with" transportation by any common carrier subject to the Act. It is a general rule of statutory construction that force and effect shall be given to specific provisions of an act over general policy announcements, and observance of this general rule requires stronger adherence in this case where Congress has declared, within the specific provision itself, the policy which the Commission must follow.

We submit that the court below was correct in stating: "If the Commission were to exercise its power and grant or withhold an exemption upon a consideration other than that stated in the statute in relation to any particular exemption, the Commission would have erred" (J. St. 21A). And the court, in concluding that the Commission is not either required or authorized to apply the National Transportation Policy when passing upon applications for grant of the exemptions provided for in Section 303 (e) (2), placed the various exemption provisions of Section 303, 49 U. S. C. 903, in harmony in the following paragraph from its opinion (J. St. 19A–20A):

> The Act provides for absolute exemptions and qualified exemptions. Exemptions are absolute in the sense that carriers may operate free from Commission regulation or scrutiny if specified conditions are satisfied. Exemptions are qualified in the sense that the Commission by order can create an exemption or remove an otherwise existing exemption. With respect to each type of qualified exemption,

Congress has spelled out the basis upon which such exemption is to be extended or withdrawn by Commission order. Whether a carrier operates under a 903 (e) (1) exemption or a 903 (g) exemption is dependent upon whether operation under such an exemption would be consistent with achievement of the aims of the National Transportation Policy. On the other hand, in Section 903 (e) (2) no mention is made of the National Transportation Policy. Rather, the basic consideration is whether transportation by contract carrier is actually and substantially competitive with transportation by any carrier subject to the water, rail or motor provisions of the Interstate Commerce Act. If if is found such transportation is not substantially competitive, either by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, the Commission may exempt so much of such transportation as is necessary to accomplish the stated policy of Congress to exclude such transportation from regulation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

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U. S. GOVERNMENT PRINTING OFFICE 1957